U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 September 2004

BALCA Case No.: 2003-INA-159
ETA Case No.: P2000-CA-0950233/ML

In the Matter of:

COUNTRY CLUB GUEST HOME,
Employer,

on behalf of

RENATO SANTOS,
Alien.

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 12, 2000, the Employer, Country Club Guest Home, applied for labor certification to enable the Alien, Renato Santos, to fill the position of "Caregiver/Household Domestic Worker." (AF 61). The job requirements were four years of high school education and three months of experience; the rate of pay was listed as $1,000 per month, but was later amended to $1,995.07 per month. (AF 61, 63).

On October 25, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification pursuant to 20 C.F.R. §§ 656.3, 656.23(c), 656.21(b)(5), and 656.21(b)(2)(ii). The CO noted that the Employer had not supplied a license to operate a care home and advised the Employer to include a copy of its care home license and state and federal business income tax returns. (AF 56). The CO also found that the Job Service coded the position as "Nurse Assistant," which is on the schedule B list of non-certifiable occupations. The Employer was informed that to petition for a schedule B waiver, the Employer needed to provide verification from the local job service office that it had completed a suppressed job order with that office for a period of thirty calendar days and that no qualified U.S. workers applied for the job. The CO also found that the Employer had not properly tested the labor market because its advertisement did not assure applicants that they would be compensated "in accordance with CA State law and regulations' for being on call 24 hours a day." (AF 57). The Employer was advised to declare its willingness to retest the labor market and submit a revised draft advertisement. In addition, the CO found that the Alien did not appear to have the three months of required experience listed in the ETA 750A. (AF 57). Finally, the CO found that the job description was unduly restrictive because it combined the duties of two or more occupations, and the Employer was advised either to: (1) amend the restrictive requirement and retest the labor market, (2) justify the requirement based on business necessity, or (3) submit documentation that the requirement is usual in the occupation or industry. (AF 58).

On November 17, 2002, the Employer submitted its rebuttal, which addressed each of the deficiencies listed in the NOF. (AF 26). A copy of the Employer's care home license from the State of California was provided, along with a copy of its proprietor's state and federal business income tax returns. (AF 27-34). A schedule B waiver was also requested and the Employer averred that no applicants responded to the offer when it was prominently displayed in the residential care home from July 20, 2000 to August 1, 2000, no applicants were referred from the local job service, the local job service posted the offer onto the CALJOBS website from July 17, 2000 to August 17, 2000, and the Employer received no inquiries from interested applicants as a result of the CALJOBS posting. (AF 35). The Employer claimed that a representative of the job service office in Sacramento advised that all labor certification requests are processed for a suppressed CALJOBS order. The Employer concluded "[w]e unfortunately have no access to the details of this information but we have full trust and confidence in the Department." (AF 36). Next, the Employer declared its willingness to retest the labor market with a revised advertisement that stated that employees would be compensated in accordance with California law and regulations for being on call twenty-fours per day. (AF 37). The Employer also claimed that one year of experience would be required instead of three months. (AF 40). Finally, the Employer argued that the combination of duties is normal and customary in the industry and required by business necessity. (AF 42).

On January 7, 2003, a Final Determination ("FD") was issued in which the CO denied certification on these grounds: (1) the Employer's care home license was dated 1993, and the Employer had not provided evidence that the license was still valid; (2) the Employer had not completed a suppressed job order; (3) the Employer had failed to present evidence that the Alien had the qualifications listed in the advertisement; and (4) the Employer's rebuttal failed to eliminate the restrictive job requirements. (AF 22-23). On February 10, 2003, the Employer requested review of the denial of labor certification and the matter was docketed by the Board on April 10, 2003. (AF 1).

DISCUSSION

The CO denied certification on the ground that a *bona fide* job opportunity did not exist. The CO reasoned that the license submitted was from 1993, and the Employer had not submitted evidence that the license was currently valid. (AF 22, 27). The copy of the license states that it is effective from August 29, 1993, and does not list an expiration date. (AF 27). There is no indication that this is a current, valid license. The Employer did not present evidence that the license was current or had been renewed since 1993. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The Employer failed to do so.

The Employer, in its request for review, included a copy of a check to the Department of Social Services for an annual license renewal fee. (AF 5). Clearly, this documentation was readily available, but the Employer did not present it when requested. Evidence first submitted with the request for review will not be considered by the Board, as our decision is to be made on the record upon which the CO denied certification. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991).

The CO found that the job description was unduly restrictive because it combined the duties of multiple occupations in violation of 20 C.F.R. § 656.21(b)(2). The CO provided the Employer the option of either deleting the restrictive requirements and retesting the labor market or establishing that the requirement is customarily performed in the intended area of employment or justified by business necessity. 20 C.F.R. § 656.21(b)(ii)

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason such requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of 20 C.F.R. § 656.21(b)(2) is to make a

job opportunity available to qualified W.S. workers. *Venture International Associates*, 1987-INA-569 (Jan. 13, 1989)(*en banc*). An employer cannot use requirements that are not normal for the occupation or are not included in the *Dictionary of Occupational Titles* ("DOT") unless it establishes a business necessity for the requirement.

The NOF stated that the job description combined the duties of general houseworker, launderer, cook, and nurse assistant. The Employer eliminated the duties related to nutrition and menu planning when it revised its draft advertisement and job description in its rebuttal. However, the CO also took issue with the duties of doing laundry, cleaning the house, and preparing and serving meals. The Employer attempted to justify this combination by business necessity, arguing that the residents need someone to perform these functions because they are too frail. While this may be true, the Employer noted that it also employs maintenance staff, a cook, and a housekeeper. If other employees perform these functions, it is unknown why the Nurse Assistant would be required to perform this unlawful combination. The Employer has failed to document business necessity for the unlawful combination. As such, labor certification was properly denied and we need not reach the other issues.

ORDER

The CO's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.